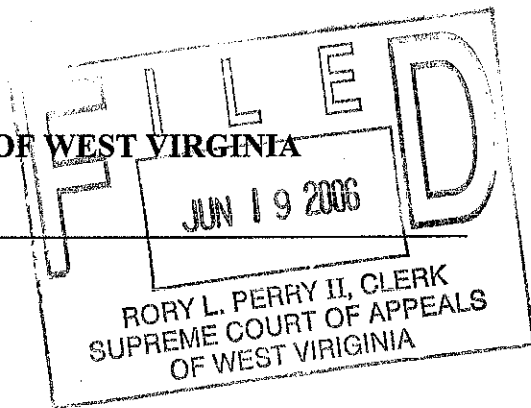


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON



CASE NO. 33078

PATTY KALANY AND ROBERT KALANY,

PLAINTIFFS BELOW/APPELLEES,

v.

HERMAN CAMPBELL, INDIVIDUALLY AND D/B/A IRENE'S BAR,

DEFENDANT BELOW/APPELLANT.

APPELLANT'S BRIEF

Counsel for Appellant:
David L. Wyant, Esquire
W.Va. Bar ID #4149
Christopher M. Elswick, Esquire
W.Va. Bar ID #8990
BAILEY & WYANT, P.L.L.C.
1219 Chapline Street
Wheeling, WV 26003
(304) 233-3100

TABLE OF CONTENTS

I.	PROCEDURAL HISTORY	4
II.	STANDARD OF REVIEW	7
III.	STATEMENT OF FACTS	8
IV.	ASSIGNMENTS OF ERROR	11
V.	TABLE OF AUTHORITIES	12
VI.	APPELLANT'S ARGUMENT	14
A.	THE TRIAL COURT ERRED BY FAILING TO GRANT THE APPELLANT'S MOTION FOR JUDGMENT AS A MATTER OF LAW WHEN THE APPELLEE FAILED TO ESTABLISH THE NECESSARY ELEMENTS OF A COMMON LAW RETALIATORY DISCHARGE CLAIM	14
1.	The Appellee failed to prove a violation of a substantial public policy ..	15
2.	The verdict form was confusing and contributed to the common law retaliatory discharge award but the trial court should have corrected this error by granting Appellant's motion for judgment as a matter of law ..	17
B.	THE TRIAL COURT ERRED BY AWARDING COSTS AND ATTORNEY'S FEES TO THE APPELLEE UNDER THE WEST VIRGINIA HUMAN RIGHTS ACT WHEN THE APPELLANT, HERMAN CAMPBELL, WAS DEEMED NOT TO BE AN EMPLOYER UNDER THE ACT AND ALL CLAIMS THEREUNDER WERE DISMISSED	20
1.	Since the verdict for common law retaliatory discharge is without support and must be reversed, there was no recovery by the Appellee and therefore no basis for an award of attorney's fees	20
2.	The trial court abused its discretion by awarding costs and attorney's fees following a jury verdict for common law retaliatory discharge	20
C.	THE TRIAL COURT ERRED BY RELYING UPON W.VA. CODE § 5-11-13 OF THE WEST VIRGINIA HUMAN RIGHTS ACT AS A BASIS FOR AWARDING COSTS AND ATTORNEY'S FEES FOLLOWING A VERDICT IN A COMMON LAW CLAIM	22

D.	THE TRIAL COURT ERRED IN APPLYING W.VA. CODE § 5-11-9 AND FINDING THAT COSTS AND ATTORNEY’S FEES MAY BE AWARDED AGAINST HERMAN CAMPBELL UNDER THE HUMAN RIGHTS ACT AS A STATUTORY “PERSON” FOR REPRISAL AGAINST THE APPELLEE ...	23
E.	ALTERNATIVELY, THE TRIAL COURT ERRED BY FAILING TO REDUCE THE AWARD OF ATTORNEY’S FEES BECAUSE THE APPELLEES DID NOT PREVAIL ON ALL OF THEIR CLAIMS	27
VII.	CONCLUSION	29

APPELLANT'S BRIEF

Now comes the Appellant, Herman Campbell, individually and d/b/a Irene's Bar, by counsel, David L. Wyant, Esquire, Christopher M. Elswick, Esquire, and the law firm of Bailey & Wyant, P.L.L.C., and respectfully requests that this Honorable Court REVERSE the August 3, 2005 and November 15, 2005 Orders of the Honorable Martin J. Gaughan, Judge of the Circuit Court of Ohio County. The August 3, 2005 Order denied the Appellant's Motion for Judgment as a Matter of Law. The November 15, 2005 Order improperly awarded attorney's fees to the Appellees.

I. PROCEDURAL HISTORY

On June 24, 2002, the Appellees filed a Complaint in the Circuit Court of Ohio County, West Virginia. The Appellees alleged causes of action including discrimination on the basis of sex and retaliatory discharge in violation of the West Virginia Human Rights Act (hereinafter "HRA" or "Act"), W.Va. Code § 5-11-1, *et seq.*, as well as common law discrimination on the basis of sex, common law retaliatory discharge against the public policy of the State of West Virginia, common law battery and spousal loss of consortium.

On March 6, 2003, the Appellees filed an Amended Complaint in the Circuit Court of Ohio County, West Virginia. The Appellees again asserted claims against Herman Campbell including statutory and common law claims of sexual harassment and retaliatory discharge as well as common law battery and spousal loss of consortium.

On March 10, 2005, the trial of this matter commenced in the Circuit Court of Ohio County, West Virginia.

On March 11, 2005, the Appellees concluded their case-in-chief. Subsequently, Herman Campbell orally moved pursuant to Rule 50(a) of the West Virginia Rules of Civil Procedure for

judgment as a matter of law on all claims. After considering the evidence, the trial court determined that Herman Campbell did not meet the definition of a statutory "employer" and therefore was not subject to the HRA. As a result, the trial court granted Mr. Campbell's oral motion for judgment as a matter of law on the Appellee, Patty Kalany's statutory HRA claims of sexual discrimination and retaliatory discharge against a public policy of the State of West Virginia. The court also dismissed Robert Kalany's claim for spousal loss of consortium. Over the objection of the Appellant, the trial court allowed the Appellee's claims for the common law torts of sexual harassment, retaliatory discharge and battery to proceed for the jury's consideration.

On March 11, 2005, Herman Campbell, individually and d/b/a Irene's Bar, presented his case-in-chief and then rested. Thereafter, Mr. Campbell renewed his previous Rule 50(a) Motion for Judgment as a Matter of Law on the remaining claims. The court denied the Appellant's motion.

The trial reconvened on March 14, 2005, at which time the jury was instructed and presented with closing arguments of counsel. Thereafter, the case was submitted to the jury for deliberation on the remaining common law claims of sexual harassment, retaliatory discharge and battery.

Following deliberation on March 14, 2005, the jury returned a verdict finding that the Appellee failed to prove by a preponderance of the evidence her common law claim of sexual harassment. Also, the jury found that the Appellee failed to prove by a preponderance of the evidence her claim of battery. However, the jury did find in favor of the Appellee on her common law claim of discharge in retaliation for Ms. Kalany's complaint of sexual harassment. As a result, the jury awarded her \$7,824.00 in damages.

On April 5, 2005, pursuant to rule 50(b) of the West Virginia Rules of Civil Procedure, Herman Campbell filed a post-verdict Motion for Judgment as a Matter of Law asserting that the jury's verdict was contrary to law and not supported by the evidence. By Order entered on August 3, 2005, the trial court denied the Appellant's motion.

On April 7, 2005, the Appellee filed a Motion for Attorney's Fees seeking costs and fees as a result of the jury's award of damages under the common law claim of retaliatory discharge. After considering the arguments of counsel and evidence presented, the trial court, by Order dated November 15, 2005, awarded costs and attorney's fees to the Appellee in the sum of \$60,095.06.

On November 30, 2005, the Circuit Court of Ohio County entered an Agreed Order Extending Time Period for Appeal which allowed the Appellant the opportunity to concurrently appeal the August 3, 2005 and November 15, 2005 Orders. The Petition for Appeal was filed on February 3, 2006. This Court entered an Order granting the appeal on May 11, 2006. The Order was received by Appellant's counsel on May 19, 2006.

II. STANDARD OF REVIEW

The Supreme Court of Appeals of West Virginia applies a *de novo* standard of review to the grant or denial of a pre-verdict or post-verdict motion for judgment as a matter of law.

Gillingham v. Stephenson, 209 W.Va. 741, 551 S.E.2d 663 (2001).

The Supreme Court of Appeals of West Virginia accords “plenary review to questions of law, including the interpretation of statutory provisions: ‘Interpreting a statute or an administrative rule or regulation presents a purely legal question subject to *de novo* review.’”

White v. Haines, 217 W.Va. 414, 618 S.E.2d 423, 429 (2005) quoting, Syl. Pt. 1, Appalachian Power Co. v. State Tax Dep’t of West Virginia, 195 W.Va. 573, 466 S.E.2d 424 (1995). Accord Syl. Pt. 1, Chrystal R.M. v. Charlie A.L., 194 W.Va. 138, 459 S.E.2d 415 (1995) (“Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review.”).

III. STATEMENT OF FACTS

Appellee, Patty Kalany, was employed as a part-time waitress/bartender for the Appellant, Herman Campbell, who was the proprietor of Irene's Bar, a bar located on National Road/US Route 40 in Triadelphia, Ohio County, West Virginia. Ms. Kalany's abilities as a waitress/bartender were less than satisfactory. While on duty, she was found asleep, sitting in a barstool with her head resting on the bar. (Transcript Volume I at 95, and Volume II at 215, 237.) Her cash register "came up short" on more than one occasion. (Tr. Vol. I at 113.) She occasionally brought her underage child into the bar and allowed him to remain there for the entirety of her shift. (Tr. Vol. I at 113, and Vol. II at 136, 216, 262.) She did not show up for her scheduled shifts. (Tr. Vol. I at 110.) She drank alcoholic beverages while on duty. (Tr. Vol. II at 260-1.)

Mr. Campbell laid-off the Appellee for the first time in October 2000 because of her inability to properly perform her duties as a waitress/bartender. (Tr. Vol. I at 76-7, 117.) After a few weeks, and at the request of her husband, Robert Kalany, Herman Campbell returned the Appellee to the work schedule. (Tr. Vol. I at 118.)

The incident which brought about the subject litigation allegedly occurred between 2:30 p.m. to 3:00 p.m. on Tuesday, November 27, 2001, when the Appellee was working as a waitress/bartender in Irene's Bar. (Tr. Vol. II at 27, 31, 33.) The single instance of alleged sexual harassment allegedly occurred when Mr. Campbell approached the Appellee while she was on-duty and sitting in a bar stool talking to patrons. (Tr. Vol. II at 36.) The Appellee alleges that Herman Campbell grabbed her by the back of the neck, pulled her back and kissed her on the lips. (Tr. Vol. II at 38.) The Appellee alleges that after the kiss she pushed Herman Campbell away and told him to never kiss her again. (Tr. Vol. II at 39.)

The Appellee testified that she was conversing with Deborah Gusic at the time of the alleged kiss. (Tr. Vol. II at 37.) However, Ms. Gusic testified that she never saw Herman Campbell kiss the Appellee. (Tr. Vol. II at 213.) No witness, other than the Appellee, testified that they observed the alleged kiss.

After the alleged kissing incident, the Appellee continued working until her shift ended at 6:00 p.m. (Tr. Vol. II at 97.) Robert Kalany, the Appellee's husband, normally arrived shortly before the end of his wife's shift so that he could drink a few beers and then drive her home. (Tr. Vol. II at 148.) After her shift ended, the appellee testified that she sat at the bar and had a drink with her husband, Herman Campbell, and Herman's wife, Bonnie Campbell. (Tr. Vol. II at 45.) Ms. Kalany left the bar with her husband after he finished his drink. (Tr. Vol. II at 42, 47.)

The Kalanys did not immediately go home. Rather, they drove to another bar, Bob's Wagon Wheel, and stayed for between one to one and one-half hours. (Tr. Vol. II at 47-8.) It was not until they returned to their home that Ms. Kalany told her husband about the alleged kiss. (Tr. Vol. II at 48.) She told him what happened and that she "handled it" by telling Herman to never kiss her again. Id. Ms. Kalany returned to work the next day and continued working for Herman Campbell the remainder of the week, through Friday, November 30, 2001. (Tr. Vol. II at 53.)

On or about, December 1, 2001, Robert Kalany went to Irene's Bar to discuss the alleged incident with Herman Campbell. (Tr. Vol. I at 84-5, 87.) Mr. Campbell told Mr. Kalany that the kiss did not happen and Mr. Kalany departed peacefully after the two men shook hands. (Tr. Vol. I at 120.)

On December 6, 2001, Herman Campbell told Ms. Kalany that he was laying her off in order to train another employee during her shift. (Tr. Vol. II at 55.) The lay-off was based in part

upon the Appellee's poor abilities as a waitress/bartender and in part upon her false accusation regarding a kiss. (Tr. Vol. I at 113.) The Appellee was not returned to the work schedule at Irene's Bar. (Tr. Vol. I at 117.)

Herman Campbell denies that he kissed the Appellee. (Tr. Vol. I at 84, 114.) Further, there was testimony that at the time of the alleged kiss, Mr. and Mrs. Campbell were out-of-town visiting Herman's son during the afternoon of November 27, 2001. (Tr. Vol. I at 162.) No witnesses testified that they saw any kiss of Patty Kalany by Herman Campbell, except for Ms. Kalany.

IV. ASSIGNMENTS OF ERROR

- A. THE TRIAL COURT ERRED BY FAILING TO GRANT THE APPELLANT'S MOTION FOR JUDGMENT AS A MATTER OF LAW WHEN THE APPELLEE FAILED TO ESTABLISH THE NECESSARY ELEMENTS OF A COMMON LAW RETALIATORY DISCHARGE CLAIM
- B. THE TRIAL COURT ERRED BY AWARDING COSTS AND ATTORNEY'S FEES TO THE APPELLEE UNDER THE WEST VIRGINIA HUMAN RIGHTS ACT WHEN THE APPELLANT, HERMAN CAMPBELL, WAS DEEMED NOT TO BE AN EMPLOYER UNDER THE ACT AND ALL CLAIMS THEREUNDER WERE DISMISSED
- C. THE TRIAL COURT ERRED BY RELYING UPON W.VA. CODE § 5-11-13 OF THE WEST VIRGINIA HUMAN RIGHTS ACT AS A BASIS FOR AWARDING COSTS AND ATTORNEY'S FEES FOLLOWING A VERDICT IN A COMMON LAW CLAIM
- D. THE TRIAL COURT ERRED IN APPLYING W.VA. CODE § 5-11-9 AND FINDING THAT COSTS AND ATTORNEY'S FEES MAY BE AWARDED AGAINST HERMAN CAMPBELL UNDER THE HUMAN RIGHTS ACT AS A STATUTORY "PERSON" FOR REPRISAL AGAINST THE APPELLEE
- E. ALTERNATIVELY, THE TRIAL COURT ERRED BY FAILING TO REDUCE THE AWARD OF ATTORNEY'S FEES BECAUSE THE APPELLEES DID NOT PREVAIL ON ALL OF THEIR CLAIMS

V. TABLE OF AUTHORITIES

CASES	PAGE
<u>Appalachian Power Co. v. State Tax Dep't of W.Va.</u> , 195 W.Va. 573, 466 S.E.2d 424 (1995) . .	7
<u>Birthisel v. Tri-Cities Health Services Corp.</u> , 188 W.Va. 371, 424 S.E.2d 606 (1992)	14, 17
<u>Bowling v. Ansted Chrysler-Plymouth-Dodge, Inc.</u> , 188 W.Va. 468, 425 S.E.2d 144 (1992) . .	21
<u>Charter Communications VI, PLLC v. Community Antenna Serv., Inc.</u> , 211 W.Va. 71, 561 S.E.2d 793 (2002)	25
<u>Chrystal R.M. v. Charlie A.L.</u> , 194 W.Va. 138, 459 S.E.2d 415 (1995)	7
<u>Daily Gazette Co., Inc. v. Canady</u> , 175 W.Va. 249, 332 S.E.2d. 262 (1985)	21
<u>Dunlap v. Friedman's, Inc.</u> , 213 W.Va. 394, 582 S.E.2d 841 (2003)	25
<u>Gillingham v. Stephenson</u> , 209 W.Va. 741, 551 S.E.2d 663 (2001)	7, 19
<u>Harless v. First Nat'l Bank in Fairmont</u> , 162 W.Va. 116, 246 S.E.2d 270 (1978)	14, 17
<u>Hayseeds, Inc. v. State Farm Fire & Cas.</u> , 177 W.Va. 323, 352 S.E.2d 73 (1986)	21
<u>Huffman v. Appalachian Power Co.</u> , 187 W.Va. 1, 415 S.E.2d 145 (1991)	14, 20
<u>Laslo v. Griffith</u> , 143 W.Va. 469, 102 S.E.2d 894 (1958)	19
<u>Meadows v. Wal-Mart Stores, Inc.</u> , 207 W.Va. 203, 530 S.E.2d 676 (1999)	26
<u>Sally-Mike Properties v. Yokum</u> , 179 W.Va. 48, 365 S.E.2d 246 (1986)	21
<u>Shafer v. Kings Tire Serv., Inc.</u> , 215 W.Va. 169, 597 S.E.2d 302 (2004)	22, 26
<u>State ex rel. West Virginia Citizens Action Group v. West Virginia Econ. Dev. Grant Comm.</u> , 217 W.Va. 102, 617 S.E.2d 143 (2003)	27, 28
<u>State ex rel. West Virginia Highland Conservancy, Inc. v. West Virginia Div. of Env'tl. Prot.</u> , 193 W.Va. 650, 458 S.E.2d 88 (1995)	27
<u>White v. Haines</u> , 217 W.Va. 414, 618 S.E.2d 423 (2005)	7

Williamson v. Greene, 200 W.Va. 421, 490 S.E.2d 23 (1997) 15, 16, 17, 19, 24, 29

STATUTES

W.Va. Code § 5-11-1 (1998) 4, 15

W.Va. Code § 5-11-3 (1998) 15

W.Va. Code § 5-11-9 (1998) 15, 20, 21, 23, 24, 25, 26

W.Va. Code § 5-11-13 (1998) 20, 21, 22, 23

ADDITIONAL RESOURCES

1 S. Speiser, *Attorneys' Fees* §§ 12:1, 12:3-12:4 (1973) 21

VI. APPELLANT'S ARGUMENT

A. THE TRIAL COURT ERRED BY FAILING TO GRANT THE APPELLANT'S MOTION FOR JUDGMENT AS A MATTER OF LAW WHEN THE APPELLEE FAILED TO ESTABLISH THE NECESSARY ELEMENTS OF A COMMON LAW RETALIATORY DISCHARGE CLAIM

"In considering whether the Motion for Judgment notwithstanding the verdict under Rule 50(b) of the West Virginia Rules of Civil Procedure should be granted, the evidence should be considered in the light most favorable to the plaintiff (non-movant), but, if it fails to establish a *prima facie* right to recover, the Court should grant the Motion." Syl. Pt. 6, Huffman v. Appalachian Power Co., 187 W.Va. 1, 415 S.E.2d 145 (1991). Considering the evidence presented in the case *sub judice* in the light most favorable to the Appellee, the evidence does not establish a *prima facie* right to recover.

The Appellee was an at-will employee of the Appellant. In the State of West Virginia, employers may discharge at-will employees with or without cause, except that employers may not terminate an employee in contravention of a substantial public policy. Harless v. First Nat'l Bank in Fairmont, 162 W.Va. 116, 246 S.E.2d 270 (1978); Birthisel v. Tri-Cities Health Services Corp., 188 W.Va. 371, 424 S.E.2d 606 (1992). This Court has stated, "to identify the sources of public policy for purposes of determining whether a retaliatory discharge has occurred, we look to established precepts in our Constitution, legislative enactments, legislatively approved regulations, and judicial opinions." Syl. Pt. 2, Birthisel v. Tri-Cities Health Services Corp., 424 S.E.2d at 606.

At the end of the Appellee's case in chief, the trial court dismissed all claims under the Human Rights Act by finding that Herman Campbell was not an "employer" under the HRA. The evidence showed that Herman Campbell did not employ "twelve or more employees within the State for twenty or more calendar weeks in the calendar year in which the

act of discrimination allegedly took place or the proceeding calendar year” See: Tr. Vol. II at 207. However, the trial court allowed the Appellee’s claims to proceed under the common law pursuant to this Court’s decision in Williamson v. Greene, 200 W.Va. 421, 490 S.E.2d 23 (1997).

In Williamson, the Court wrote:

Even though a discharged at-will employee has no statutory claim for retaliatory discharge under W.Va. Code, 5-11-9(7)(C) [1992] of the West Virginia Human Rights Act because his or her former employer was not employing twelve or more persons within the state at the time the acts giving rise to the alleged unlawful discriminatory practice were committed, as required by W.Va. Code, 5-11-3(d) [1994], the discharged employee may nevertheless maintain a common law claim for retaliatory discharge against the employer based on alleged sex discrimination or sexual harassment because sex discrimination and sexual harassment in employment contravene the public policy of this State articulated in the West Virginia Human Rights Act, W.Va. Code, 5-11-1, et seq.

Syl. Pt. 8, Williamson v. Greene, 200 W.Va. 421, 423, 490 S.E.2d 23, 25 (1997).

The trial court determined that Williamson provided authority for the Appellee to present claims for the common law tort of sexual harassment and a corresponding retaliatory discharge based on the alleged sexual harassment. Id. The court found that the allegation of sexual harassment was a contravention of substantial public policy which, if proven, would allow an at-will employee to bring an action for retaliatory discharge under Williamson. Therefore, the court allowed both the common law sexual harassment claim and the common law retaliatory discharge claim to proceed pursuant to the judicial opinion and rationale of Williamson. See: Tr. Vol. II at 208-10.

1. The Appellee failed to prove a violation of a substantial public policy.

In this case, the specific stated source of the “substantial public policy” applicable to the Appellee’s common law retaliatory discharge claim is the claim of sexual harassment, *i.e.*, that Herman Campbell kissed the Appellee on the lips on November 27, 2001. See: Tr. Vol. II at 209.

The jury found against the Appellee on the common law sexual harassment claim, which

was the substantial public policy basis for the Appellee's common law retaliatory discharge claim. However, the jury found in favor of the Appellee with respect to her claim for common law retaliatory discharge. On the verdict form, Special Interrogatory No. 1 asked, "[h]as plaintiff proved by a preponderance of the evidence her sexual harassment claim against defendant Herman Campbell?" The jury responded, "No." See: Verdict Form. However, on the Verdict Form, Special Interrogatory No. 2 asked, "[d]o you find that Patty Kalany has proven by a preponderance of the evidence that she was discharged by Herman Campbell in retaliation of her complaint of sexual harassment?" The jury responded, "Yes." See: Verdict Form. The finding of no sexual harassment in Special Interrogatory No. 1 of the Verdict form makes the response to Special Interrogatory No. 2 inconsistent and unable to stand as a matter of law because the finding of sexual harassment was the necessary violation of a substantial public policy that allowed for a common law retaliatory discharge claim under Williamson, supra.

This litigation boiled down to whether or not Herman Campbell kissed Patty Kalany. (Tr. Vol. III at 8-9, 16.) The trial court ruled that the only actionable allegation of sexual harassment was the alleged kiss. (Tr. Vol. II at 207-9.) Ms. Kalany testified that the kiss, the only alleged instance of sexual harassment, allegedly occurred on November 27, 2001. (Tr. Vol. II at 27, 31.) In its verdict, the jury found no sexual harassment. See: Verdict Form. It necessarily follows from the jury's verdict that they found that Herman Campbell did not kiss the Appellee on the lips on November 27, 2001. If there was no kiss, then there was no sexual harassment. If there was no sexual harassment, then there was no substantial public policy violation that would allow a claim for common law retaliatory discharge under the rationale of Williamson, supra.

Since the jury found no violation of a substantial public policy, by finding no sexual harassment, the general employment law principle would apply, *i.e.*, the Appellee was an at-will

employee who could be terminated with or without cause. See: Harless v. First Nat'l Bank of Fairmont, 162 W.Va. 116, 246 S.E.2d 270 (1978); Birthisel v. Tri Cities Health Services Corp., 188 W.Va. 371, 424 S.E.2d 606 (1992). In the case *sub judice*, the evidence is that the Appellee was not rescheduled to work at Irene's Bar by Herman Campbell because of performance based reasons as well as her false allegation to her husband about an alleged kiss. (Tr. Vol. I at 113). In the absence of a violation of substantial public policy (in this case, sexual harassment), the decision by an employer to dismiss an at-will employee in part as a result of learning that she made false accusations of sexual harassment is not actionable in West Virginia. Succinctly, there is no public policy against an employer discharging an at-will employee who falsely accuses the supervisor of sexual harassment.

As a result of the jury's finding of no kiss and therefore no sexual harassment, the Appellee failed to meet his burden of proof of a violation of a substantial public policy necessary for the claim of a retaliatory discharge under the rationale of Williamson, *supra*. Therefore, the lower court erred as a matter of law in failing to grant the Appellant's Rule 50(b) motion for judgment as a matter of law.

2. The verdict form was confusing and contributed to the common law retaliatory discharge award, but the trial court should have corrected this error by granting Appellant's motion for judgment as a matter of law.

While the jury found that Patty Kalany "was discharged by Herman Campbell in retaliation of her complaint of sexual harassment," there is also evidence that the jury was confused by the Verdict Form. As stated, Special Interrogatory No. 2 asks, "[d]o you find that Patty Kalany has proven by a preponderance of the evidence that she was discharged by Herman Campbell in retaliation of her complaint of sexual harassment?" It is clear that this Special

Interrogatory was inartfully drafted.¹ Special Interrogatory No. 2 or directions related to this Special Interrogatory should have informed the jury that if they found no sexual harassment in response to Special Interrogatory No. 1 of the Verdict Form, then they could not find retaliatory discharge of the Appellee by her employer, Herman Campbell, under Special Interrogatory No. 2.

During deliberations, the jury inquired of the Court, “[q]uestion 2 of the verdict form, does complaint mean formal legal complaint or just complaining of what happened?” (Tr. Vol. III at 66.) Over the objection of the Appellant, the Court answered, “[a] complaint does not mean a formal legal complaint. Please review the first full paragraph on page 11 of the instructions.”² (Tr. Vol. III at 73.) The only complaint made by Patty Kalany was to her husband, Robert Kalany. This complaint was of an alleged kiss by Herman Campbell. Clearly, the jury was confused as to whether or not they must find in favor of the Appellee on the retaliatory discharge claim, if they believed that Ms. Kalany was discharged in retaliation for simply complaining to her husband about an alleged kiss that the jury believed did not occur. The Verdict Form should have instructed the jury that if they found no sexual harassment in answering Special Interrogatory No. 1, then they could not find retaliatory discharge under Special Interrogatory No. 2.

The jury’s answer to Special Interrogatory No. 2 is inconsistent with its answer to Special Interrogatory No. 1 and contrary to West Virginia law which requires a violation of a substantial

¹ The Verdict Form was originally prepared by counsel for the Appellant but was modified after consultation with counsel for Appellee and ultimately became a joint product.

² The referenced portion of page 11 of the Instructions reads as follows: “Before plaintiff can recover for wrongful discharge, she must prove by a preponderance of the evidence that plaintiff engaged in protected activities. Protected activity is both a subjective and objective standard. The plaintiff’s opposition must be reasonable in the sense that it must be based on the facts and the legal theory must be plausible. Further, simply telling her husband is not a protected activity unless you find that it was a part of the opposition to sexual harassment.”

public policy to establish a common law retaliatory discharge claim under Williamson. It is not a violation of a substantial public policy to discharge an employee because the employee complained to her husband about a kiss, if the kiss did not occur. It is not a violation of a substantial public policy to discharge an employee for making false accusations about physical contact between an employer and the employee.

Therefore, without a finding of sexual harassment, there was no violation of a substantial public policy of the State of West Virginia which would allow for a finding of common law retaliatory discharge. As a result, the jury's verdict regarding the retaliatory discharge claim is unsupported by the evidence. See: Syl. Pt. 3, Gillingham v. Stephenson, 209 W.Va. 741, 551 S.E.2d 663 (2001).

As discussed above, the Appellee failed to establish a *prima facie* right to recover. The jury found that Patty Kalany failed to prove by a preponderance of the evidence her sexual harassment claim against Herman Campbell. See: Verdict Form. There can be no discharge in retaliation for a complaint of sexual harassment, because there was no sexual harassment. Therefore, the jury's award of \$7,824.00 to the Appellee for approximately one year of past lost wages as a result of retaliatory discharge, should have been set aside by the trial court as contrary to the evidence and applicable law. See: Syl. Pt. 4, Laslo v. Griffith, 143 W.Va. 469, 102 S.E.2d 894 (1958). After considering the evidence in the light most favorable to the Appellee, this Honorable Court should reverse the decision of the trial court because only one reasonable conclusion as to the verdict can be made. That is, the verdict for the Appellees of common law retaliatory discharge is contrary to the evidence and applicable law. Syl. Pt. 6, Huffman v. Appalachian Power Co., 187 W.Va. 1, 415 S.E.2d 145 (1991).

B. THE TRIAL COURT ERRED BY AWARDING COSTS AND ATTORNEY'S FEES TO THE APPELLEE UNDER THE WEST VIRGINIA HUMAN RIGHTS ACT WHEN THE APPELLANT, HERMAN CAMPBELL, WAS DEEMED NOT TO BE AN EMPLOYER UNDER THE ACT AND ALL CLAIMS THEREUNDER WERE DISMISSED

1. Since the verdict for common law retaliatory discharge is without support and must be reversed, there was no recovery by the Appellee and therefore no basis for an award of attorney's fees.

On November 15, 2005, the trial court entered an Order granting the Appellee's Motion for Attorney's fees. See: Order, entered November 15, 2005. The trial court based its award of costs and attorney's fees to the Appellee on the jury's verdict in favor of the Appellee's common law retaliatory discharge claim. Id. As discussed above, the common law retaliatory discharge verdict is contrary to the evidence and applicable law, and it must be set aside. It necessarily follows that the award of costs and attorney's fees also must fail.

2. The trial court abused its discretion by awarding costs and attorney's fees following a jury verdict for common law retaliatory discharge.

The trial court wrongfully relied upon provisions of the West Virginia Human Rights Act to award the Appellee \$60,095.06 in costs and attorney's fees in this matter. In its November 15, 2005 Order, the trial court relied on the HRA, and specifically W.Va. Code §§ 5-11-9 and 5-11-13, as the basis for its decision to award costs and attorney's fees to the Appellee who recovered only on a common law retaliatory discharge claim. In paragraph 5 of the Conclusions of Law portion of the Order, the trial court wrote, "[t]he court further concludes that attorney's fees and the costs of litigation should be awarded in this case against Herman Campbell, as a statutory "person" for his reprisal against Patty Kalany for reporting the kiss to her husband, pursuant to W.Va. Code § 5-11-9 and § 5-11-13." See: Order, entered November 15, 2005.

The trial court abused its discretion by basing its award of costs and attorney's fees to the

Appellee on the Human Rights Act in a case where the HRA did not apply to the Appellee's substantive claims. This abuse of discretion constitutes error by the trial court. While the Appellant does not believe that the award for a common law retaliatory discharge is sustainable, the fact is that the jury's verdict was for a common law retaliatory discharge. Under the common law, West Virginia follows the American rule which does not allow for the award of costs and attorney's fees.

The American rule with respect to attorney's fees is that "as a general rule each litigant bears his or her own attorney's fees absent a contrary rule of court or express statutory or contractual authority for reimbursement." Syl. Pt. 2, Sally-Mike Properties v. Yokum, 179 W.Va. 48, 365 S.E.2d 246 (1986); Daily Gazette Co., Inc. v. Canady, 175 W.Va. 249, 250, 332 S.E.2d. 262, 263 (1985); 1 S. Speiser, *Attorneys' Fees* §§ 12:1, 12:3-12:4 (1973). There have been fee-shifting exceptions noted in West Virginia, e.g., Hayseeds, Inc. v. State Farm Fire & Cas., 177 W.Va. 323, 352 S.E.2d 73 (1986) (when insureds substantially prevail against their own insurer in insurance coverage cases); Bowling v. Ansted Chrysler-Plymouth-Dodge, Inc., 188 W.Va. 468, 425 S.E.2d 144 (1992) (when fraudulent conduct results in injury to the plaintiff). There is no express statutory or contractual authority in West Virginia to award a prevailing party costs and attorney's fees in a common law retaliatory discharge claim. Further, there has never been a case to award attorney's fees for a common law retaliatory discharge claim in West Virginia. Therefore, the American rule as to costs and fees applies in this matter and costs and attorney's fees are not to be awarded to the Appellee as there is no rule of court or express statutory or contractual authority for reimbursement that applies to this common law claim.

The HRA cannot be the basis for a common law award of costs and attorney's fees. The

common law, as set forth above, follows the American rule with respect to fees and does not allow for an award of costs and attorney's fees in this case. The Court erred in using a portion of the HRA to award costs and attorney's fees under the common law claim. Therefore, the granting of an award of costs and attorney's fees pursuant to W.Va. Code § 5-11-13, when the Appellee presented only common law claims, was an abuse of the trial court's discretion and should be reversed. See: Shafer v. Kings Tire Serv., Inc., 215 W.Va. 169, 177, 597 S.E.2d 302, 310 (2004).

C. THE TRIAL COURT ERRED BY RELYING UPON W.VA. CODE § 5-11-13 OF THE WEST VIRGINIA HUMAN RIGHTS ACT AS A BASIS FOR AWARDING COSTS AND ATTORNEY'S FEES FOLLOWING A VERDICT IN A COMMON LAW CLAIM

As stated, the trial court's basis for awarding costs and attorney's fees to the Appellee herein was W.Va. Code § 5-11-13 of the Human Rights Act. See: Order, entered November 15, 2005. The trial court's reliance upon this statute to provide it with the discretion necessary to award costs and attorney's fees is misplaced. A simple reading of the relevant portion of W.Va. Code § 5-11-13 of the Human Rights Act illustrates the problem. Section 5-11-13 states, in relevant part, "*[i]n actions brought under this section*, the court in its discretion may award all or a portion of the costs of litigation, including reasonable attorney fees and witness fees, to the complainant." W.Va. Code § 5-11-13 (1998) (Emphasis added). All of the Appellee's statutory claims under the HRA were dismissed prior to verdict. The common law claim for retaliatory discharge was not brought under the Human Rights Act. Therefore, the HRA did not apply to the common law claim of retaliatory discharge. Further, since the common law claim of retaliatory discharge was not made under the HRA, the circuit court had absolutely no legal basis or any discretion to award attorney's fees to the Appellee under §5-11-13 of the HRA.

D. THE TRIAL COURT ERRED IN APPLYING W.VA. CODE § 5-11-9 AND FINDING THAT COSTS AND ATTORNEY'S FEES MAY BE AWARDED AGAINST HERMAN CAMPBELL UNDER THE HUMAN RIGHTS ACT AS A STATUTORY "PERSON" FOR REPRISAL AGAINST THE APPELLEE

In its November 15, 2005 Order, the court awarded costs and attorney's fees in the sum of \$60,095.06. Without directly acknowledging that there was no authority to award attorney's fees under the common law, the trial court relied exclusively upon the Human Rights Act, and specifically W.Va. Code § 5-11-13, which grants the court discretionary power to award costs and attorney's fees for actions brought under the HRA. The trial court also relied on W.Va. Code § 5-11-9 by concluding that Herman Campbell was a "person" rather than an "employer," and therefore was subject to the Human Rights Act for the purpose of costs and attorneys fees, even though the court had previously dismissed all substantive HRA claims against him. Further, the lower court also wrongfully held that employer Herman Campbell engaged in threats of reprisal regarding unlawful discriminatory practices as support for this erroneous award of costs and attorneys fees.³ The court's holding is without factual support or legal authority and further misconstrues the aforementioned sections of the HRA.

There was no claim asserted by the Appellee in the Complaint or Amended Complaint filed herein asserting that Herman Campbell was anything other than the employer of the Appellee for the purposes of the litigation. Second, the Appellee did not assert in the Complaint or Amended Complaint any allegation that Herman Campbell's actions constituted reprisal against the Appellee under the HRA. Additionally, all claims made by the Appellee under the HRA were dismissed by the trial court prior to verdict. Further, the jury did not return a verdict

³ As shown above, the jury found no unlawful discriminatory practices by finding no sexual harassment.

for the Appellee based upon a claim of reprisal. Therefore, the Trial Court has no basis with which to award costs and attorney's fees based upon a claim of reprisal under the Human Rights Act. The trial court misconstrued and misapplied W.Va. Code § 5-11-9 to find that Herman Campbell was a statutory "person" and engaged in an act of reprisal against Patty Kalany for her opposition to a forbidden act. It cannot realistically be disputed that Mr. Campbell's employment decisions and actions toward Ms. Kalany were performed in his capacity as her employer. A sole proprietor who takes any employment action, adverse or otherwise, is acting within the employer-employee relationship. Therefore, the trial court misconstrued the facts and statute, and erred in relying on the term "person" in the HRA to award costs and attorney's fees to the Appellee.

A simple review of the case of Williamson v. Greene, the case relied upon by the trial court to allow the Appellee's common law claims of sexual harassment and retaliatory discharge to proceed at trial, clearly indicates that the trial court's finding and award of costs and attorney's fees is erroneous. In Williamson, this Court found that the Human Rights Act and its provisions do not apply where the employer had less than 12 employees. This Court did not make an exception for a claim of reprisal under W.Va. Code § 5-11-9(7). Rather, while specifically citing W.Va. Code § 5-11-9(7), this Court did not allow for an independent claim against an "employer" under the definition of "person" to proceed under the Human Rights Act. Indeed, in Williamson, the Court interpreted W.Va. Code § 5-11-9(7) to "prohibit an employer or other person from retaliating against an individual for expressing opposition to [a protected] practice" See: Williamson, 490 S.E.2d at 31. The Williamson court did not believe that an employer also should be separately considered a "person" under the reprisal section of the HRA. Since the employer in Williamson did not meet the statutory definition of "employer" under the HRA, this

court held that no claim of any kind against the employer could be made under the HRA. The trial court in the case *sub judice* should have made the same finding and denied the request for costs and attorney's fees under the HRA.

The Circuit Court's interpretation of W.Va. Code § 5-11-9(7) also violates traditional canons of statutory interpretation. First, the interpretation violates the rule against statutory absurdity. This Court explained this rule in Charter Communications VI, PLLC v. Community Antenna Serv., Inc., when it said, "a well established cannon (sic) of statutory construction counsels against . . . an irrational result [for] '[i]t is the "duty of this Court to avoid whenever possible a construction of a statute which leads to absurd, inconsistent, unjust or unreasonable results.'" Dunlap v. Friedman's, Inc., 213 W.Va. 394, 582 S.E.2d 841 (2003), quoting Charter Communications VI, PLLC v. Community Antenna Service, Inc., 211 W.Va. 71, 77, 561 S.E.2d 793, 799 (2002).

The trial court's interpretation of the HRA and its application to costs and attorneys fees, while not to the substantive claims of the suit is an absurd, unjust and unreasonable result. The absurd, unjust and unreasonable result is that sole proprietor Herman Campbell was deemed to be acting as an individual, not an employer, when he laid-off his employee after she lied to her husband about an alleged kiss. Herman Campbell was the Appellee's employer. Under the HRA, Herman Campbell did not meet the definition of employer, so the HRA was inapplicable. To hold that this "employer," who is not subject to the HRA, is a "person" subject to the HRA in order to award costs and attorney's fees against the employer under the HRA is absurd, unjust and unreasonable.

The Court's interpretation of §5-11-9(7) also violates the rule against statutory nullity. This Court explained that this rule is "[a] cardinal rule of statutory construction . . . that

significance and effect must, if possible, be given to every section, clause, word or part of the statute.” Dunlap v. Friedman’s, Inc., 213 W.Va. 394, 582 S.E.2d 841 (2003), quoting Syl. Pt. 3, Meadows v. Wal-Mart Stores, Inc., 207 W.Va. 203, 530 S.E.2d 676 (1999). West Virginia Code §5-11-9(7) describes various claims that can be asserted by a claimant in making a claim under the Human Rights Act. Importantly to this discussion, §5-11-9(7) begins: “For any person, employer, employment agency, labor organization, owner, real estate broker, real estate salesman or financial institution to... .” In order for the lower court to find a sole proprietor and employer such as Herman Campbell to be a “person” under §5-11-9(7), the court had to ignore the above quoted clear and ambiguous language which includes “person”, “employer” or other entities. If “person” was intended in § 5-11-9(7) to include all human beings in whatever capacity, then subsection 7 would not include employer and the other above quoted entities, but rather would simply begin, “For any person to” The trial court’s interpretation of the word “person” in this subsection nullifies all significance to the words following “person” in subsection 7, *i.e.*, the words “employer, employment agency, labor organization, owner, real estate broker, real estate salesman or financial institution,” because the trial court’s all-encompassing definition of “person” includes each of those entities. W.Va. Code § 5-11-9 (1998). Therefore, the trial court has misconstrued this section of the HRA. In this case, it is not disputed that Herman Campbell was the employer of Patty Kalany at the time of the alleged incident. It also is clear that Herman Campbell was not a statutory “employer” under the HRA and therefore no part of the HRA applied to him.

The trial court had previously dismissed all claims of the Appellee under the HRA and therefore had no basis to rely upon any language of the HRA to award costs and attorney’s fees. Further, the trial court’s interpretation of the statutory language of W.Va. Code § 5-11-9(7) was

inaccurate, contrary to West Virginia law and contrary to the rules of statutory construction. The trial court's award of costs and attorney's fees to the Appellee is therefore an abuse of discretion and contrary to law. See: Shafer v. Kings Tire Serv., Inc., 215 W.Va. 169, 177, 597 S.E.2d 302, 310 (2004).

E. ALTERNATIVELY, THE TRIAL COURT ERRED BY FAILING TO REDUCE THE AWARD OF ATTORNEY'S FEES BECAUSE THE APPELLEES DID NOT PREVAIL ON ALL OF THEIR CLAIMS

While it is the uncompromising position of Herman Campbell that an award of costs and attorney's fees was contrary to West Virginia law and improper in the case *sub judice*, Mr. Campbell alternatively asks this Court to reverse the trial court's decision not to reduce its award of costs and attorney's fees pursuant to State ex rel. West Virginia Citizens Action Group, wherein this Court reduced an award of attorney's fees upon finding that the Appellant was successful on less than 50% of its claims. State ex rel. West Virginia Citizens Action Group v. West Virginia Econ. Dev. Grant Comm., 217 W.Va. 102, 617 S.E.2d 143 (2003).

In State ex rel. West Virginia Citizens Action Group, the court held that an "[a]ppportionment of attorney's fees is appropriate where some of the claims and efforts of the claimant were unsuccessful. Where part of the attorney's fees sought were expended on discrete efforts that achieved no appreciable advantage in this litigation, or where the claim for attorney's fees rests partly on a result to which a claimant made no significant contribution, a court may consider these circumstances and apportion the attorney's fees accordingly. Syl. Pt. 5, State ex rel. West Virginia Highland Conservancy, Inc. v. West Virginia Division of Environmental Protection, 193 W.Va. 650, 458 S.E.2d 88 (1995)." Syl. Pt. 4, Id.

In the matter before this Court, the Appellee was successful on only one of six claims

raised against Herman Campbell.⁴ However, the trial court failed to reduce the award of costs and attorney's fees. See: Order, entered November 15, 2005. Under the rationale of State ex rel. West Virginia Citizens Action Group, the trial court erred in not reducing the costs and attorney's fees award based on the failure of the statutory claims of sexual harassment and retaliatory discharge, the common law claim of sexual harassment, the common law claim of battery and the spousal loss of consortium claim. It is clear to all that the above cited failed claims caused plaintiff to incur costs and fees which provided no appreciable advantage in the litigation. Further, the sole basis for the award of costs and attorneys fees would be the decision by the lower court ex parte to raise a claim of reprisal under the HRA, which claim was not even raised by the plaintiff and therefore the plaintiff made no significant contribution thereto. Under these circumstances, the court failed to address the rationale in State ex rel. West Virginia Citizens Action Group, *supra*, and properly reduce the requested award of costs and attorneys fees.

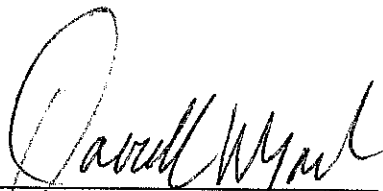
⁴ The claims asserted by the Appellees in the amended complaint were statutory Human Rights Act claims of sexual harassment and retaliatory discharge and common law claims of sexual harassment, retaliatory discharge, battery and loss of consortium. As stated, the statutory claims of sexual harassment and retaliatory discharge as well as Mr. Kalany's loss of consortium claims were dismissed by the court at the conclusion of the Appellee's case pursuant to a Rule 50(a) Motion. The jury found against the Plaintiff/Appellee with regard to the common law sexual harassment claim as well as the battery claim.

VII. CONCLUSION

Based on the above arguments and authorities, the trial court erred in denying the Appellant's Rule 50(b) Motion for Judgment as a Matter of Law as it pertains to the jury's verdict for the Appellee in the amount of \$7,824.00 for common law retaliatory discharge where the jury found that there had been no sexual harassment which was the only substantial public policy asserted as necessary proof of the common law retaliatory discharge pursuant to Williamson v. Greene. Additionally, the trial court erred in awarding costs and attorney's fees of \$60,095.06 under discretionary authority provided by the Human Rights Act where all statutory claims under the Human Rights Act were previously dismissed. Simply put, the trial court abused its discretion by awarding attorney's fees in a common law retaliatory discharge claim.

Wherefore, the Appellant, Herman Campbell, respectfully requests that this Honorable Court REVERSE the August 3, 2005 and November 15, 2005 Orders of the Circuit Court of Ohio County, and all further relief as this Court deems appropriate.

HERMAN CAMPBELL, INDIVIDUALLY AND
D/B/A IRENE'S BAR,
By Counsel



David L. Wyant, Esq.
W.Va. Bar ID #4149
Christopher M. Elswick, Esq.
W.Va. Bar ID #8990
BAILEY & WYANT, P.L.L.C.
1219 Chapline Street
Wheeling, WV 26003
(304) 233-3100

CERTIFICATE OF SERVICE

Service of the foregoing **APPELLANT'S BRIEF** was had upon the following by mailing a true and correct copy herein by United States mail, postage prepaid, on this 16 day of June, 2006:

Ronald William Kasserman, Esquire
Kasserman & Bowman PLLC
21 Waddles Run Road, Suite 202
Wheeling, WV 26003



David L. Wyant
W.Va. Bar ID #4149